No. 80-674

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MICHAEL RODAK, JR., CLI

In the Supreme Court of the United States

OCTOBER TERM, 1980

LAREDO PACKING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging certain employees because of their union activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 3a-77a) are reported at 241 N.L.R.B. No. 24.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1980. The petition for a writ of certiorari was filed on October 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Adopting the decision of the administrative law judge, the Board found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by its individual discharges of two employees and by its group discharge of eight employees because of their union activities (Pet. App. 4a-6a).[1] The Board's findings are based on the following facts.

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[1] Member Penello dissented with respect to the finding that the group discharge was unlawful (Pet. App. 13a-14a).

The Board also found that petitioner violated Section 8(a)(1), (3), (4), and (5) of the Act by discharging five other employees and by reducing the hours of another, by interrogating and threatening employees regarding their union activities, by prohibiting employees from wearing union insignia, by creating the impression of surveillance of employees' union activities, and by granting wage increases during negotiations although impasse had not been reached (Pet. App. 4a-5a). Before the court of appeals, petitioner did not contest the Board's findings that it violated both Section 8(a)(1) by coercively interrogating and threatening

In November 1976, the Union [2] commenced an organizing campaign chiefly among the kill-floor employees and truckdrivers at petitioner's meat-processing plant in Laredo, Texas (Pet. App. 19a-20a). In response to the employees' drive for union representation, petitioner's agents repeatedly threatened to discharge employees engaged in union activities and undertook intensive efforts to identify and to retaliate against union supporters in the plant.

Kill-floor employee Santos was the initiator of the union campaign and one of its chief organizers. He made the first contact with the Union and conducted one of the first union meetings and several meetings thereafter. He distributed approximately 85 union cards to employees at their homes, and also at the plant during break periods and in the parking lot. (Pet. App. 27a; Tr. 16-19, 31-32.)[3]

Santos sustained a work-related injury on October 4, 1976. He continued work until 10 days later when, with the permission of his supervisor, he left the job

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employees, creating the impression of surveillance, and prohibiting the wearing of union insignia, and Section 8(a)(3) and (1) by discharging one employee and by reducing the hours of another because of their union activities. The court of appeals upheld all of the Board's findings (Pet. App. 1a-2a). In this Court, petitioner contests only the findings that the two individual discharges and the group discharge were unlawful.

[2] Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 171.

[3] "Tr." refers to the transcript of the hearing before the administrative law judge. "RX" refers to the exhibits introduced by petitioner at that hearing. The citations to the record herein are taken from the Board's brief in the court of appeals.

to see a doctor. Santos stayed home for the remainder of the month of October, but returned to work for intervals during the months of November and December. Santos took additional leave from work to receive medical treatment, but only after obtaining his supervisor's permission to do so. On January 14, 1977, Santos' doctor told him that he could return to work and gave him a note that he should be assigned to lighter duties. (Pet. App. 27a-28a; Tr. 21-24; RX 11.)

The following day, a Saturday, Santos reported to his supervisors but was told to return to work the following Monday (Pet. App. 28a; Tr. 24-25, 34-35). When Santos reported as instructed, Supervisor Martinez told him that there was no work for him because he was not "dependable." Santos asked for an explanation and Supervisor Martinez answered that Santos left the job "any time [he] wanted to." Santos protested, noting that Martinez had granted him permission to leave and that he was never warned or reprimanded by anyone that his absences, although excused and for necessary medical treatment, jeopardized his job. (Pet. App. 28a; Tr. 25-26.) During Santos' nine-year service to petitioner, he sustained only one other injury that kept him from work (Pet. App. 31a; Tr. 40, 1079-1080; RX 11). During the three-month period following Santos' second injury, petitioner never warned Santos that his excused absences were regarded as other than necessary for his rehabilitation.

Truckdriver Gerardo Moncivais was also an active supporter of the Union. Moncivais attended union meetings, signed a union card, and solicited signatures from other employees at their homes and during break periods at the plant. (Pet. App. 34a;

Tr. 265-267.) Moncivais worked as a truckdriver for the last four years of his employment with petitioner and averaged seven or eight trips per week (Pet. App. 34a; Tr. 289-290, 264-265).

On December 12, 1976, Moncivais was en route to Edinburg, Texas, for a pickup of cattle when the truck's engine failed. Moncivais called the maintenance department, which sent out a crew with another truck for Moncivais to continue his route. On December 19, Moncivais experienced difficulty with another truck he drove on assignment, and the maintenance department again released a second truck for Moncivais' use. (Pet. App. 34a-35a; Tr. 272-275.) An investigation showed that the first breakdown was due to some broken parts resulting from a pin that had fallen into the motor. The second vehicle was not repaired until a substantial time after the incident and then underwent a major overhaul. (Pet. App. 35a; Tr. 272-275; RX 14.) Neither Plant Superintendent Gonzales, who had direct supervision over Moncivais' work, nor any other supervisor discussed the mechanical failures with Moncivais when he returned to the plant from his trips (Pet. App. 35a, 38a; Tr. 1128-1131, 1442-1443).

Plant Superintendent Gonzales ceased assigning trips to Moncivais shortly after the second breakdown and told Moncivais that he was suspended and should speak to Vice President Rogelio Salinas. Moncivais reported to Salinas, who stated his belief that the engine failures were "too much of a coincidence" and that, after speaking to Plant Superintendent Gonzales, he would make a decision about Moncivais' continued employment. About a week later, Moncivais was told by Plant Superintendent Gonzales that he had been terminated but that Gonzales did not know

the reason for the discharge. When Moncivais called Vice President Salinas about his termination, Salinas merely reiterated his belief that the truck breakdowns were not a "coincidence." (Pet. App. 35a-36a; Tr. 278-283.) Salinas refused to speak to the mechanics concerning the breakdowns as Moncivais requested, and added that he did not have to explain anything about the decision to terminate Moncivais' employment (Pet. App. 36a; Tr. 264, 282-283).

Each of the eight truckdrivers included in the group discharge—Oscar Martinez, Alfredo Moncivais, Jaime Galvan, Juan Macias, Samuel Medina, Jose Escamilla, Gregorio Juarez, and Abel Hinojosa—attended union meetings, signed union cards, and otherwise demonstrated support for the Union. Several also visited the homes of other employees and solicited them to sign authorization cards. (Pet. App. 6a; Tr. 616-618, 668, 695-696, 709, 737, 809, 818-819, 958.) Sales Manager Garcia, the truckdrivers' supervisor, engaged in a vigorous campaign against the Union, and either knew or suspected that the discharged truckdrivers were involved in union activities. Thus, Garcia stated his intent to fire "all the Moncivaises along with the truckdrivers because they were responsible for bringing in the Union" (Pet. App. 59a), told Martinez on two occasions that he had a "list" of truckdrivers who had signed union cards (*id.* at 51a), and, upon learning that Martinez had attended union meetings, stated that Martinez should not "get his hopes too high" about continued employment with petitioner (*id.* at 51a, 59a). Garcia also notified other employees to "keep an eye" on Martinez and Juarez because of their suspected union activities (*id.* at 50a-51a), told Marcias that he would be "faced with some trouble" because he was "speaking * * * for the

union" (*id.* at 56a), and told Galvan that he thought the truckdrivers were responsible for bringing in the Union (*id.* at 54a).

Within weeks after Sales Manager Garcia's threats to discharge truckdrivers and his specific threats to individual employees, President Roberto Salinas received notification from petitioner's insurance broker that the eight truckdrivers were uninsurable, and he immediately instructed Garcia to terminate their employment (Pet. App. 57a-58a, 60a-61a; Tr. 1206, 1423). The group discharge eliminated approximately half of petitioner's 18 to 20 drivers and included two of petitioner's "best drivers," Moncivais and Juarez, and two "very good" drivers, Medina and Martinez (Pet. App. 60a; Tr. 1222-1223, 1253-1254). Petitioner did not speak to its insurance broker concerning the possibility of using another insurance carrier, did not make inquiries regarding the formula used to determine the drivers' uninsurability, and did not pursue the drivers' protests that their driving demerits were inaccurately shown in reports enclosed with the letter and that their records did not warrant exclusion from coverage (Pet. App. 8a-10a; Tr. 627, 634-635, 639, 701-702, 966, 1228, 1423). Although Sales Manager Garcia promised at least one driver that petitioner would "check and see what can [be done] about the insurance," no efforts were made in that regard. When another driver inquired as to the time it would take "to work something out," Garcia replied that he should "forget it" because "that's what you get for going with the union. Go to the little people in the union and see if they can't help you." (Pet. App. 55a, 60a; Tr. 740-741, 760.)

2. In finding the discharges to be motivated by the employees' union activities, the Board affirmed

the rulings, findings, and conclusions of the administrative law judge (Pet. App. 4a) and rejected petitioner's assertion that the employees were discharged for cause. Initially, the administrative law judge noted petitioner's "hosti[lity] to the Union" and stated that he had considered the "sum total of [petitioner's] antiunion conduct" in assessing the discharges (*id.* at 21a).

The administrative law judge found that petitioner's asserted justifications for discharging Santos, a senior and respected employee (Pet. App. 31a; Tr. 14, 29-30), were pretextual. Thus, the reason given Santos at the time of his discharge was that he was undependable and left work whenever he wanted. But the administrative law judge found that Santos had his supervisor's permission for his absences, which resulted from the need to receive medical treatment for his work-related injury (Pet. App. 27a-28a). The administrative law judge further found that the adverse inference to be drawn from the untenable reason given Santos for his termination was strengthened by the inconsistent and unpersuasive explanations that petitioner offered at the hearing (Pet. App. 30a). Thus, Sales Manager Garcia testified that one of the reasons for not putting Santos back to work was that "we didn't have no opening, because we had to hire somebody else to do his work" (Pet. App. 30a; Tr. 1203, 1318), but the administrative law judge found this reason to be inconsistent both with the instruction originally given Santos by the foreman that he report to work on Monday and with the reason given Santos at the time of his discharge (Pet. App. 30a). Sales Manager Garcia further testified that petitioner could not accommodate the doctor's request that Santos be assigned to lighter

duties because "we don't have no light duties in the plant" (Tr. 1318). However, the administrative law judge noted that lighter duties had been assigned to at least two other employees who had been injured (Pet. App. 31a; Tr. 29, 37-38). Petitioner's additional claim that it discharged Santos because he was "too accident prone" (Pet. App. 30a-31a; Tr. 1318) was belied by record evidence that Santos had previously sustained only one other injury that kept him out of work (Tr. 40, 1079-1080; RX 11).

Similarly, the administrative law judge found that petitioner's contention that it discharged Gerardo Moncivais because of his alleged abuse in operating two trucks did "not stand up under scrutiny" (Pet. App. 36a-37a). Petitioner relied on the testimony of Vice President Rogelio Salinas that he approved Moncivais' termination only after petitioner's maintenance supervisor, Don Meis, informed Salinas that the trucks had been abused. Meis admitted that the first truck's mechanical failure could have happened at any time without fault on the driver's part. (Pet. App. 35a-36a; Tr. 1118-1119, 1126-1128.) With regard to the second truck, Meis testified that he had supervised the repairs that indicated that the truck's engine had been "over-speeded," and he faulted Moncivais for the damage to the truck (Pet. App. 37a; Tr. 1119-1120, 1131). However, a repair bill showed that the repairs on the second truck had neither been performed by petitioner's maintenance department nor supervised by Meis (Pet. App. 37a-38a; Tr. 1139-1140; RX 14). The administrative law judge found (Pet. App. 38a) that the false testimony "raise[d] a serious question concerning the credibility of [petitioner's] entire defense as to Moncivais' case." The administrative law judge also relied on the fact that

Moncivais was not questioned concerning the disabled trucks by Meis, Vice President Salinas, or any other supervisor (*ibid.*).

Finally, the administrative law judge disbelieved petitioner's assertion that it discharged the group of eight truckdrivers because of their purported uninsurability. The administrative law judge determined "that there is direct evidence pointing to the fact that [petitioner] discharged these employees in retaliation for their known or suspected union activities and support of the Union" and that their "discharge * * * was an unlawful implementation of Garcia's" previous threats against them (Pet. App. 59a). On the basis of all the evidence, the administrative law judge concluded that "the record clearly * * * established a strong *prima facie* case in support of the complaint's allegation that the truckdrivers under consideration were terminated in violation of the Act" (*id.* at 57a).

The Board further held that the justification offered by petitioner for the discharges—the notification by its insurance broker that the drivers were no longer considered insurable—was insufficient to overcome the overwhelming evidence of antiunion motivation (Pet. App. 7a-10a, 58a-61a). The Board "found that absent such antiunion motivation, [petitioner] would not have discharged these drivers so promptly * * * without, at the very least, having taken some further action to retain them" (Pet. App. 7a).

In reaching this conclusion, the Board noted that petitioner was faced with a sudden announcement that approximately half of its 18-20 drivers would no longer be insured (Pet. App. 7a). Upon receipt of this notice, President Roberto Salinas immediately told Sales Manager Garcia to notify the drivers of

their discharge (*id.* at 7a-8a). Garcia testified that among those to be discharged were his "two best drivers" and two more "very good" drivers. He testified that this situation made him "a little bit panicky" (Pet. App. 8a; Tr. 1209), that the orientation of a new driver takes about a month, and that for every 10 applicants only one or two were retained (Pet. App. 8a; Tr. 1258). The eight drivers therefore could not readily be replaced and their termination had a severe impact on petitioner's total driver workforce (Pet. App. 9a). Despite the serious effect on its business, petitioner did not investigate the drivers' protests that their driving demerits were inaccurately shown on the reports enclosed with the insurance company's letter, that their driving records were not unsatisfactory, or that other drivers with worse records were not excluded from coverage (Pet. App. 9a-10a; Tr. 627, 634-635, 639, 701-702, 966, 1228). Based on these circumstances, the Board concluded that, absent antiunion motivation, petitioner would not have summarily discharged eight drivers without even discussing the matter with the insurance company in order to avoid the sudden and unprecedented loss of almost half its driver workforce.[4]

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-2a). After referring to the "rather sordid story" of petitioner's attempts to obstruct its employees' efforts to organ-

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[4] Of course, the Board did not hold that petitioner must employ drivers who are uninsurable. Rather, it held that the mere notification of exclusion from coverage by one insurance carrier did not justify the immediate and wholesale discharge of a group of prounion employees, where petitioner was merely seizing an opportunity to rid itself of employees at whom it had previously directed coercive interrogations, surveillance, and antiunion threats.

ize, the court stated its "unwavering conviction that the Board's findings of unfair labor practices are supported by substantial evidence on the record as a whole" (*id.* at 2a). The court also noted that, "[w]ith particular regard to the eight truck drivers discharged due to their purported uninsurability," it relied on "the Board's thorough and well-reasoned opinion" (*ibid.*).

ARGUMENT

Petitioner's principal contention is that, with respect to the group discharge, the Court should grant certiorari to resolve an asserted conflict among the circuits as to the standard to be applied in discriminatory discharge cases when there is evidence that an employer had both proper and improper motives for the discharges (Pet. 8). However, that question is not presented on this record. The Board's decision here, which was affirmed by the court of appeals, found that petitioner was not motivated by a valid, nonpretextual reason in discharging these employees, and that the sole basis for the discharges was anti-union animus. Thus, the only question presented in this case as to these discharges, as well as to the two individual discharges, is whether substantial evidence supports the Board's finding that the discharges were not motivated by legitimate business considerations. That evidentiary issue was correctly decided below and in any event does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Moreover, contrary to petitioner's contention (Pet. 8-14), the court of appeals' decision does not conflict with *Mt. Healthy City School Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977), which sets forth

a standard subsequently adopted by the Board in *Wright Line*, 105 L.R.R.M. 1169, 1170 (Aug. 27, 1980). Consistent with those cases, the evidence here plainly established a *prima facie* showing that the discharges were discriminatorily motivated, and demonstrated that petitioner's assertion of good cause did not withstand scrutiny.[5]

Furthermore, notwithstanding petitioner's contentions concerning Santos and Moncivais (Pet. 14-17), the Board could reasonably infer petitioner's knowledge of the employees' union activities and was not required to rely on direct evidence that petitioner knew the discharged employees had joined the union effort. See *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 602 (1941). Here, the Board inferred such knowledge from petitioner's intensive campaign to uncover union supporters. Thus, management interrogated employees about their own and other employees' union activities, told employees that it knew of their union activities, mentioned other employees who had been identified as union supporters or were under suspicion, and enlisted employees to watch and report on the union activities of others (Pet. App. 21a-23a, 32a, 40a-42a, 43a, 51a-52a, 54a, 56a). Sales Manager Garcia stated that he had a list of employees who supported the Union, thereby indicating that petitioner was engaged in surveillance of union meetings, and he specifically learned that Oscar Martinez

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[5] Petitioner argues (Pet. 13-14) that the Board improperly imposed on it the burden of proving that the discharges would have occurred in the absence of antiunion motivation. However, even if it is assumed that the Board had the burden in this regard, it was at least incumbent upon petitioner to establish that it had a valid reason for the discharges. The overwhelming evidence in this record and the Board's clear findings show that it failed to do so.

was active in union affairs (*id.* at 51a). He also told a recently terminated employee "that's what you get for going with the union" (*id.* at 60a). In these circumstances, it is, at the least, a permissible inference that petitioner had knowledge of the union activities of Santos, the initiator and leader of the Union's organizational campaign, and Gerardo Moncivais, an active union adherent (*id.* at 6a-7a, 30a, 39a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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